Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Applications of Tribune Media Company and Sinclair Broadcast Group for Consent to Transfer Control of Licenses and Authorizations	)	MB Docket No. 17-179

PETITION TO DENY

AMERICAN CABLE ASSOCIATION

The American Cable Association hereby submits this Petition to Deny in response to recent amendments filed by Sinclair Broadcast Group, Inc. ("Sinclair") in support of its proposed acquisition of Tribune Media Company ("Tribune").[1] We continue to object to the proposed transaction for many of the reasons specified in our initial petition to deny,[2] including:

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1 *Media Bureau Establishes Consolidated Pleading Cycle for Amendments to the June 26, 2017, Applications to Transfer Control of Tribune Media Company to Sinclair Broadcast Group, Inc., Related New Divestiture Applications, and Top-Four Showings in Two Markets*, Public Notice, DA 18-530, MB Docket No. 17-179 (rel. May 21, 2018) ("*May Public Notice*"). As specified therein, we submit this Petition to Deny in response to each of the applications, and corresponding with each of the file numbers, listed in the May Public Notice. Pursuant to the instructions in the May Public Notice, and after consultation with Commission staff, we are filing this Petition in MB Docket No. 17-179, and will serve counsel for each of Sinclair, Tribune, and the divestiture applicants.

2 Petition to Deny of American Cable Association, MB Docket No. 17-179 (filed Aug. 7, 2017) ("ACA Petition"); *Applications of Tribune Media Co. and Sinclair Broadcast Group, Inc. for Consent to Transfer Control of Licenses and Authorizations*, MB Docket No. 17-179, May

- Applicants have failed to provide sufficient information for the Commission to engage in the necessary analysis, including any meaningful analysis with respect to retransmission consent.[3]
- Applicants would gain additional leverage in local markets, enabling them to raise retransmission consent fees ultimately paid by ACA member subscribers.[4]
- Applicants would gain substantial new *national* leverage, enabling them to raise retransmission consent fees ultimately paid by ACA member subscribers.[5]

ACA also supports, and hereby incorporates by reference, the Comments filed today by the American Television Alliance, of which ACA is a member and which we helped draft.[6] ATVA's comments stated:

- The Commission may not lawfully ignore retransmission consent, either with respect to the transaction generally or with respect to Applicants' "top-four" showings in St. Louis and Indianapolis specifically.

14, 2018 Amendment to Comprehensive Exhibit (filed May 14, 2018) ("May Amendment"). The May Amendment represents Applicants' fourth such change to its original application. *Applications of Tribune Media Co. and Sinclair Broadcast Group, Inc. for Consent to Transfer Control of Licenses and Authorizations*, MB Docket No. 17-179, Amendment to June Comprehensive Exhibit (filed April 24, 2018) ("April Amendment"); *Applications of Tribune Media Co. and Sinclair Broadcasting Group, Inc. for Consent to Transfer Control of Licenses and Authorizations*, MB Docket No. 17-179, Amendment to June Comprehensive Exhibit (filed March 8, 2018); *Applications of Tribune Media Co. and Sinclair Broadcast Group, Inc. for Consent to Transfer Control of Licenses and Authorizations*, MB Docket No. 17-179, Amendment to June Comprehensive Exhibit (filed Feb. 20, 2018).

3 ACA Petition at 9.

4 *Id.* at 10-18.

5 *Id.* at 18-20.

6 *See* Comments of the American Television Alliance, MB Docket No. 17-179 (filed June 20, 2018).

- Applicants have failed to demonstrate that retransmission consent harms—which the Commission has already determined will occur generally when parties combine two top-four stations in a market—will not occur in St. Louis and Indianapolis.
- Applicants have failed to demonstrate that claimed benefits of top-four combinations in St. Louis and Indianapolis will outweigh retransmission consent-related harms.

We write separately to emphasize two additional issues. First, the divestiture applicants have not even attempted to show that their proposed divestitures serve the public interest. Second, to the extent the Commission permits divestitures to occur "immediately after closing," it should require Sinclair and any purchasers to agree that Sinclair does not "acquire" or "obtain control of" the stations to be divested. That clarification is necessary because Sinclair's retransmission consent agreements contain "after-acquired-station clauses," which automatically raise retransmission consent fees for any station that Sinclair acquires. Without such a clarification, the purchasers of stations divested by Sinclair might attempt to raise prices under these after-acquired-station clauses, thereby undermining the purposes of the divestiture.

I. DIVESTITURE APPLICANTS HAVE FAILED TO DEMONSTRATE THAT THE DIVESTITURES WOULD SERVE THE PUBLIC INTEREST.

Under Section 310(d) of the Communications Act, no broadcast license may be transferred or assigned unless the Commission first finds that the transfer or assignment would serve "the public interest, convenience, and necessity."[7] This

[7] 47 U.S.C. § 310(d); *AT&T Inc. and DIRECTV*, 30 FCC Rcd. 9131, ¶ 2 (2015) ("*AT&T and DIRECTV*").

requirement obviously applies to *all* transfers and assignments—including proposals for divestiture meant to bring a separate transaction into compliance with Commission rules and antitrust obligations. While it is easy to think of these as merely "divestiture applications," they themselves contemplate substantial changes to the disposition of Commission licenses, and raise their own public interest issues. One set of divestitures—those to Fox—will allow a national network that also owns numerous related assets to expand its television station portfolio substantially.[8]

Here, however, none of the divestiture applications contain *any* demonstration with respect to the public interest. Rather, all of them—including transfers to Fox, Howard Stirk, and Cunningham Broadcasting—contain statements substantially similar to this one:

> The instant application is one of a number of applications ("Applications") being filed contemporaneously herewith seeking Commission consent to assign the stations listed below from subsidiaries of Tribune Media Company ("Tribune") to Fox Television Stations, LLC ("FTS") immediately prior to the consummation of the pending merger (the "Merger Transaction") of Sinclair Broadcast Group, Inc. ("Sinclair") and Tribune. Applications with respect to the Merger Transaction were filed on June 26, 2017. [9]

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[8] Of course, the growth of network owned and operated stations raises particular issues as they relate to network-affiliate relations. *See, e.g.*, Comments of the ABC Television Affiliates Association *et. al*, MB Docket No. 17-318 (filed Mar. 19, 2018).

[9] *See, e.g.*, BALCDT- 20180514ABF Exhibit 5, *available at* https://licensing.fcc.gov/cgi-bin/ws.exe/prod/cdbs/forms/prod/cdbsmenu.hts?context=25&appn=101784222&formid=314&fac_num=22215.

In considering license transfers, the Commission weighs claimed benefits of the proposed transfer against any potential public interest harms.[10] Since divestiture applicants have submitted no evidence of public interest benefits, the Commission must reject the divestitures upon finding of any harm.

And there is good reason to think that the divestiture transactions will themselves cause harm. For example, the divestitures of stations to Fox will make Fox larger nationally. Fox's reach will grow from 37 percent of homes to 46 percent (not counting the UHF discount).[11] After the transaction, Fox will cover 19 of the top 20 local markets in the U.S.[12] This dramatically increased national reach, in turn, will give Fox even more leverage to raise retransmission consent prices than it has today—just as the "principal" transaction will give *Sinclair* even more leverage than it has today. Just as the Commission will have to consider whether Sinclair's increased national reach will lead to higher prices, it must consider whether *Fox's* increased national reach will likewise lead to higher prices. In Fox's case, the leverage will prove especially harmful because it would give Fox new combinations of network affiliates and Regional Sports Networks in Miami, Cleveland, and San Diego.[13] By any measure, then a stand-alone Sinclair-

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10 *E.g.*, *Media General, Inc. and Nexstar Media Grp., Inc.*, 32 FCC Rcd. 183, ¶ 19 (2017).

11 Reuters Staff, *Fox to Buy Seven TV Stations from Sinclair for About $910 Million*, Reuters (May 9, 2018, 8:20 AM), https://www.reuters.com/article/us-tribune-media-m-a-sinclair-ma/fox-to-buy-seven-tv-stations-from-sinclair-for-about-910-million-idUSKBN1IA1SH.

12 Emily Price, *Fox is Buying 7 Sinclair-Owned Television Stations for $910* Million, Fortune (May 9, 2018), http://fortune.com/2018/05/09/fox-buying-sinclair-stations/.

13 Fox may or may not divest its RSNs to Disney, Comcast/NBCU, or a third party. As the Commission found in *Comcast-NBCU*, the combination of broadcast and RSN assets can enable an integrated entity to raise prices. *Comcast Corp., Gen. Elec. Co. & NBC Universal, Inc.*, 26 FCC. Rcd. 4238, ¶ 138 (2011) ("We conclude that commenters have raised a legitimate concern about the effect the combination of Comcast's RSNs and the NBC O&O stations will have on carriage prices for both of those networks.").

Fox "divestiture" is a transaction that deserves attention commensurate with the review given to other major broadcast transactions, such as *Nexstar-Media General*, *Gannett-Belo*, and *Tribune-Local TV*, as the transaction could be compared to those transactions.[14]

II. THE COMMISSION SHOULD CONFIRM THAT SINCLAIR WILL NOT "ACQUIRE" TRIBUNE STATIONS TO BE DIVESTED.

Sinclair has suggested that certain divestitures of Tribune stations will occur "immediately after" closing.[15] The Commission should either require Sinclair to commit as a condition of approval that it will not "acquire" or obtain "control" of such stations or it should deny the transaction. Otherwise, Sinclair would be able to activate its after-acquired clauses for stations that it is supposed to be divesting. As described in earlier correspondence,[16] here's how such "laundering" could work:

- Suppose that SmallTown Cable Company carries Tribune Station A for $1.00 per month. Suppose further that SmallTown Cable also carries a Sinclair Station B for $2.00 per month.

- Now suppose that SmallTown Cable's agreement with Sinclair contains an "after-acquired station" clause so that it applies to any station Sinclair purchases.

- Suppose Tribune Station A transferred to Divestiture Buyer "immediately after consummation of the transaction." Sinclair could argue that it "acquired" Tribune Station A during the very short intermediate period. In such case, the after-acquired station clauses would apply—meaning that the station's rate would increase from $1.00 to $2.00.

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[14] *See, e.g.*, *Media Gen., Inc. and Nexstar Media Grp., Inc.*, 32 FCC Rcd. 183 (2017); *Belo Corp. and Gannett Co., Inc.*, 28 FCC Rcd. 16867 (2013); *Local TV Holdings, LLC and Tribune Broad. Co. II, LLC,* 28 FCC Rcd. 16850 (2013).

[15] *See* May Amendment at 6 n.16 ("Stations marked with a * will be divested immediately after consummation of the Transaction. Stations marked with a ** will be divested immediately prior to consummation of the Transaction.");

[16] *See* Letter from Ross Lieberman to Marlene Dortch, MB Docket Nos. 17-179 *et al.*, at 1-2 (filed Mar. 12, 2017).

- If Divestiture Buyer assumes Station A's contracts, and no other contract between SmallTown Cable and Divestiture Buyer governs, then SmallTown Cable would pay $2.00 going forward, instead of the $1.00 it would have paid had Divestiture Buyer obtained the station immediately before closing.

Of course, Sinclair *itself* would not obtain higher retransmission consent rates under this scenario, so one might question its incentive to argue that it had acquired Tribune Station A. Yet Tribune Station A is more valuable to Divestiture Buyer at the "Sinclair rate" than at the "Tribune rate," and Sinclair may have accounted for this additional value in setting the station's divestiture price. Alternatively, Sinclair may contemplate ongoing involvement in retransmission consent for Station A going forward, for which a higher "entry price" would presumably constitute an advantage—especially if, as appears to be the case, Sinclair's management fee depends on the "divested" station's retransmission consent fees.[17] In light of our concerns with the documents

[17] As discussed in ATVA's comments, the Joint Sales Agreement and Shared Services Agreements between Sinclair and Armstrong gives Armstrong nominal control of retransmission consent. Sinclair's management fee, however, depends on Armstrong's retransmission consent fees—strongly suggesting that Sinclair at a minimum possesses information about Armstrong's retransmission consent negotiations in violation of the prohibition on joint ownership rules. Joint Sales Agreement, available at https://licensing.fcc.gov/cdbs/CDBS_Attachment/getattachment.jsp?appn=101784249&qnum=5040&copynum=1&exhcnum=2 ("Armstrong Form JSA"); (requiring station to elect retransmission consent); Shared Services Agreement, available at https://licensing.fcc.gov/cdbs/CDBS_Attachment/getattachment.jsp?appn=101784249&qnum=5040&copynum=1&exhcnum=3 ("Armstrong Form of SSA") ("Station Licensee shall retain the authority (a) to make elections for must-carry or retransmission consent status, as permitted under the FCC Rules, and (b) to negotiate, execute, and deliver retransmission consent agreements with cable, satellite, and other multichannel video providers ("MVPDs") for which Station Licensee has provided timely notice of its election of retransmission consent."); *Id.* Schedule A ¶ 3 (incorporating by reference JSA Schedule 3.1); Armstrong Form JSA Schedule 3.1, ¶ 1. ("Net Sales Revenue. For purposes of this Agreement, the term 'Net Sales Revenue' means (i) all gross revenue received by Sales Agent or Station Licensee for all Advertisements, less agency, buying service or other sales commissions paid to or withheld by an advertiser, agency or service, as the case may be, (ii) any network compensation or other similar payments (net of any expenses for reverse retransmission payments other expenditures paid by Station Licensee or otherwise paid in respect of the

Sinclair *has* submitted, we continue to urge the Commission to require Applicants to submit *all* documentation related to the divestiture applications, since Sinclair appears to have unilaterally determined not to provide such documents.[18]

Longstanding Commission precedent states that Sinclair does not obtain "control" of a station for purposes of the Communications Act through the kind of "essentially instantaneous" transaction contemplated here.[19] Yet this Commission precedent may not stop Sinclair or a divestiture party from claiming otherwise to smaller cable operators that may not have resources with which to dispute the point with Sinclair in court. The Commission should either clarify that Sinclair does not "acquire" or obtain "control" of Tribune divestiture stations for *all* purposes, or, if Sinclair is unwilling to concede the point, deny the transactions on this basis.

Station pursuant to applicable network agreements) made to Station Licensee or otherwise paid in respect of the Station or its programming, (iii) any retransmission fees or other similar payments (net of any expenditures paid pursuant to applicable retransmission consent agreements and/or OTT agreements) made to Station Licensee or otherwise paid in respect of the Station or its programming or other payments made to Station Licensee pursuant to any retransmission consent agreements and (iv) any other amounts designated for inclusion in the calculation of Net Sales Revenue pursuant to the terms and subject to the conditions of this Agreement.").

[18] *See* Letter from Ross Lieberman to Marlene Dortch, MB Docket No. 17-179 (filed May 24, 2018).

[19] *See, e.g.*, *John H. Phipps, Inc. (Assignor) and WCTV Licensee Corp. (Assignee)*, 11 FCC Rcd. 13053, ¶ 9 (1996) (permitting non-substantive "essentially instantaneous" transfers to complete complex transactions).

Respectfully submitted,

AMERICAN CABLE ASSOCIATION

By: 

Matthew M. Polka
President and CEO
American Cable Association
875 Greentree Road
Seven Parkway Center, Suite 755
Pittsburgh, Pennsylvania 15220
(412) 922-8300

Ross J. Lieberman
Senior Vice President of Government Affairs
American Cable Association
2415 39th Place, NW
Washington, DC 20007
(202) 494-5661

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Certificate of Service

I, Ross Lieberman, hereby certify that on this day, true and correct copies of the foregoing Petition to Deny were sent by electronic mail (where indicated with an asterisk) and first-class mail to the following:

Colby M. May, Esq., PC
P.O. Box 15473
Washington, DC 20003
Attorney for Howard Stirk Holdings and Affiliates

David G. O'Neill
1200 New Hampshire Ave, NW
Ste 600
Washington, DC 20036
Attorney for Sinclair Divestiture Trust

Joseph M. Di Scipio
400 North Capitol St, NW
Ste 890
Washington, DC 20001
Attorney for Fox Television Stations, LLC

Scott R. Flick
Pillsbury, Winthrop, Shaw, Pittman LLP
1200 17th St, NW
Washington, DC 20036
Attorney for Cunningham Broadcasting Corporation and Affiliates

Mace J. Rosenstein
Covington & Burling LLP
One City Center
850 Tenth Street, NW
Washington, DC 20001
Attorney for Tribune Media Company

Miles S. Mason
Pillsbury Winthrop Shaw Pittman LLP
1200 Seventeenth Street, NW
Washington, DC 20036
Attorney for Sinclair Broadcast Group, Inc.

David Roberts*
Federal Communications Commission
Video Division, Media Bureau
445 12th Street, SW
Washington, DC 20554
David.Roberts@fcc.gov

David Brown*
Federal Communications Commission
Video Division, Media Bureau
445 12th Street, SW
Washington, DC 20554
David.Brown@fcc.gov

Jeremy Miller*
Federal Communications Commission
Video Division, Media Bureau
445 12th Street, SW
Washington, DC 20554
Jeremy.Miller@fcc.gov

Ross Lieberman
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